IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1134 of 1986

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHRI PURSHOTTAM N. THAKKAR

Versus

THE STATE OF GUJARAT (NOTICE TO BE SERVED THROUGH

Appearance:

MR SHALIN N MEHTA for the Petitioner.

Mr.S.N. Shelat, Advocate General, with

Mr.Sheth, Assistant GOVERNMENT PLEADER for Respondent Nos. 1-2

RULE SERVED for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 15/12/2003

ORAL JUDGEMENT

1. This is a thoroughly misconceived petition filed by the petitioner, challenging the action of the State Government in not promoting the petitioner to the post of

Secretary of the Gujarat Legislature Secretariat, and instead, appointing respondent No.3 on the aforesaid post.

So far as the post of Secretary in the Gujarat Legislature Secretariat is concerned, according to the petitioner, it is a newly created post. According to the petitioner, in view of his seniority, he was required to be given priority in such appointment as compared to respondent No.3, who, according to him, was given re-employment and he had already retired on 31st August, 1986. The petitioner has given particulars about his service record in paragraph 3 of the petition. As per the same, the petitioner was initially appointed as Junior Assistant on 2nd August, 1960 in the Gujarat Legislature Secretariat. Thereafter, he was promoted as Superintendent in 1965 and, ultimately, promoted as Deputy Secretary in December, 1980. According to him, his overall service record is good and he was required to be considered for promotion to the aforesaid post of Secretary. He has also relied upon the Promotion Rules in this behalf.

By filing this petition, the petitioner has challenged the action of the respondents of not considering him for promotion to the aforesaid post of Secretary and also the consequential action of the Department of promoting / appointing respondent to the aforesaid post. It is submitted by Mr.Shalin Mehta for the petitioner that respondent No.3 should not have been given extension by the Government. By filing this petition, it is prayed by the petitioner for a declaration that he is entitled to be promoted to the post of secretary of the Gujarat Legislature Secretariat with effect from 1.10.1984. He has also prayed that

respondent No.1 be directed to give deemed date of promotion to the petitioner and to give consequential benefits based on the said deemed date. It is also prayed that the action of the Department in re-employing respondent No.3 is illegal and arbitrary, and the same is required to be quashed and set aside. As there were some adverse remarks in the service record of the petitioner, it is prayed that the adverse remarks which are recorded against the petitioner in the service record, are unauthorised and illegal and the same also may be set aside.

2. On behalf of the petitioner, it is argued by Mr.Mehta that, at the relevant time, the petitioner was also allowed to cross efficiency bar and was given selection grade also and, therefore, the action of respondent No.1 in not considering the case of the petitioner for promotion is illegal.

3. During the course of hearing, it is brought to the notice of the Court that, subsequently, the petitioner was already promoted in the year 1989.

4. The relevant Rules for appointment to the post of Secretary in the Gujarat Legislature Secretariat are as under :-

" ... ...

8. Appointment to post of Secretary.--(1) Appointment to the post of Secretary shall be made by the Governor after consultation with the Speaker and the Commissioner either -

(i) by promotion from amongst the Deputy Secretaries holding a degree in law of a statutory University in India, entitling them to be enrolled as Advocates under the Advocates Act, 1961, or

(ii) by direct selection, or

(iii) by transfer of a person from the State or other Service.

(2) Where appointment is to be made by direct selection a person who is not more than 45 years of age and -

(a) who has practised as an Advocate or a pleader in any High Court or Courts subordinate thereto in India for not less than seven years, or

(b) who holds a degree in law of a statutory University in India entitling him to be enrolled as an Advocate under the Advocates Act, 1961 and

(i) has held any judicial post for not less than seven years, or

(ii) is holding a post in a Government Office not

lower in rank than that of an Under Secretary of a department of the Secretariat for a period of not less than five years and has experience of legal work in Government service for not less than seven years;

shall be eligible for appointment;

Provided that for computing the period of seven years in Judicial service or Government service the period during which a candidate has practised as Advocate or Pleader shall be treated as part of such service.

Provided further that preference may be given to a candidate who has experience of work relating to parliamentary practice and procedure or of legal drafting.

(3) Where appointment is to be made by transfer a person holding a degree in law of a statutory University in India entitling him to be enrolled as an Advocate under the Advocates Act, 1961, and

(a) holding a post not lower in rank than that of an Assistant District Judge, or

(b) holding a post in a Government office not lower in rank than that of a Deputy Secretary of a Department of the Secretariat and having experience of legal work in Government service for not less than seven years; shall be eligible for appointment.

(4) A candidate appointed by direct selection shall be on probation for a period of two years.

... ..."

5. The State Government has filed affidavit-in-reply, controverting the averments made in the petition. In paragraphs 8, 9, 10, and 13 of the reply, it is stated as under :-

" ... ...

8. I say that in exercise of the powers conferred by clause (3) of Article 187 of the Constitution of India, the Governor of Gujarat, after consultation with the Speaker of the Gujarat Legislature Assembly, is pleased to make

the rules known as "Gujarat Legislature Secretarial Staff (Recruitment and Conditions of Service) Rules, 1974. The said Rules are hereinafter referred to as the "Rules". Rule 5 of the said Rules provides that subject to the ultimate authority of the Governor, the Speaker shall have full control over the Secretarial staff and the administration of the Secretariat. Rule 6 provides that the Secretary shall, subject to the over-all control of the Speaker, exercise full administrative control over the Secretariat Staff and shall be responsible for the working of the Secretariat. As regards the appointment to the post of Secretary, relevant rule is rule 8, which is reproduced in the petition in paragraph 4 at page 5. I say that appointment to the post of Secretary, which is a Head of the Department, is to be made by the Governor, after consultation with the Speaker and the Gujarat Public Service Commission. It is open to the appointing authority to appoint a candidate to the said post either by promotion from amongst the Deputy Secretaries having requisite qualifications or by direct selection or by transfer of a person from the State or other Service. I say that for appointment to the post of Secretary now to be made, the Honourable Speaker has recommended that the said post be filled up by transfer of a person who holds the post of District & Sessions Judge and has experience of five years as such. I say that the process of getting a judicial officer of the above standing by transfer for appointment to the said post necessarily takes some time. However, the State Government has already requested by its letter dated 3rd March, 1986 to the Honourable High Court of Gujarat through the Registrar, Gujarat High Court to suggest the name of a suitable person from Judiciary who can fulfil the requirements of Secretary, Gujarat Legislature Secretariat. The State Government is awaiting a reply to the said letter and, therefore, the appointing authority will take a decision in respect of the appointment to the said post. I say that the post is to be filled up by transfer and making appointment would necessarily take some time and it is, therefore, that only for that limited period, appointment of the third respondent is made to the impugned post upto August 31, 1986. I, therefore, say that there is no question of the petitioner being eligible for being

considered for appointment to the said post. I say that since 1st October, 1984, the third respondent is discharging the duties of Secretary to the Gujarat Legislature Secretariat to the knowledge of the petitioner.

9. With reference to the contents of paragraph 2 of the petition, it is denied that petitioner is entitled as of right to be promoted to the post of Secretary to the Gujarat Legislature Secretariat. I further say that if the appointing authority decides to appoint Secretary, Gujarat Legislature Secretariat by promotion, petitioner would be one of the candidates who would be eligible for being considered for promotion. However, if the appointing authority decides to make appointment to the impugned post of Secretary by other modes mentioned in rule 8 of the Rules, petitioner will not even be eligible for being considered for any alleged promotion.

10. I further say that it is not correct to say that the reporting and reviewing authority cannot be the same. I say that there is nothing in the Government Resolution, General Administration Department dated 8.3.1969 referred to in the said paragraph which inhibits the reporting authority from becoming the reviewing authority. I further say that the contention of the petitioner that the adverse remarks against the petitioner are no remarks in the eye of law on the ground that they are contrary to the scheme mentioned in the Government Resolution dated 8.3.1959, is not correct and I do not admit the same. I also deny that writing of the confidential reports in the case of the petitioner was in contravention of the Circular and principles of natural justice and / or violative of Articles 14 and 16 of the Constitution of India as alleged. I say that in the instant case, relating to the Gujarat Legislature Secretariat, apart from reporting and reviewing officers, the Honourable Speaker in the Grading Officer, who assesses the performance of an officer objectively, while grading the officer. I say that the provision of grading officer of the level of the Honourable Speaker is itself a complete safeguard against any arbitrary action. I do not admit that the remarks communicated to the petitioner were vague and baseless as alleged. I say that the Confidential

Report of the petitioner for the period from 1.4.1983 to 31.3.1984 in columns 10 and 14 disclosed the remarks "Tatasthya man Kachas; Parantu Tatasthya Nabali" (lacking in impartiality; weak in impartiality) respectively. I deny that the action of the authority in re-employing and promoting respondent No.3 is based on absolutely irrational or extraneous consideration or amount to denial of promotion to the petitioner or is in violation of Articles 14 and 16 of the Constitution as alleged.

xxx xxx xxx

13. With reference to the contents of paragraph 4 of the petition, I crave leave to refer to the Rules and also rule 8 referred to in the said paragraph. I say that he is holding a degree in law. I do not agree that petitioner is fully qualified to be promoted to the post of Secretary as per rule 8(i) of the said Rules. I also do not agree that petitioner was entitled to be promoted to the post of Secretary with effect from 1st October 1984 as alleged. I do not admit that petitioner had necessary merits for being so promoted. I say that appointment to the post of Secretary which is a post of the Head of the Department is an appointment purely on merits. Even in case when the appointing authority decides to promote a candidate from amongst the Deputy Secretaries, it is a selection post. I say that the principle applicable in respect of promotion to key posts as Heads of Departments, even in the State Government, and which is being followed by the Gujarat Legislature Secretariat, is by selection of the best officer. It is submitted that such key posts of Heads of Departments, even if filled up by promotion, are selection posts to be filled up purely on merits. I further say that it is not correct to say that petitioner was entitled to be promoted to the post of Secretary with effect from 1st October, 1984. I say that the present petition is filed in the year 1986. Petitioner is, therefore, not entitled to make any grievance about he having not been promoted in October, 1984. I deny that without any basis and / or with a view to favour respondent No.3, the then Secretary wrote the Confidential Reports of the petitioner for the year 1983-84 on the last day of his retirement as alleged. I crave leave to refer to the said

Confidential Reports. I say that petitioner was promoted as Deputy Secretary with defect from 1st December, 1980, and on 1st October, 1984 he had not even completed four years' service as Deputy Secretary. The third respondent was working as Joint Secretary at that time and had put in more than 30 years' service in the Legislature Secretariat and had put in 9 years' service as Under Secretary and 8 years' service as Deputy Secretary and more than 2 years and 7 months as Joint Secretary. I say that the Confidential Reports of the petitioner for the year 1983-84 was written by the then Secretary on 5th September 1984 and the then Secretary retired on 30th September, 1984. I further say that petitioner's grading was done by the Honourable Speaker on 2nd January, 1985 and therafter only adverse remarks were communicated to him. I say that it is true that petitioner had made a representation to the Honourable Speaker. I say that the Honourable Speaker was away from 24th September, 1984. I deny that remark of "partiality" was extremely shocking as alleged by the petitioner.

... ..."

6. Mr.S.N. Shelat, learned Advocate General, has argued that looking to the nature of the post and looking to the responsibility attached to the post, more meritorious person was required to be appointed and considering the comparative records of the petitioner and respondent No.3, respondent No.3 was found more fit for the job in question. It is argued by the learned Advocate General that even if adverse remarks of the earlier part were not required to be taken into consideration, at the relevant time, adverse remarks of the previous year were in existence, against the petitioner. Comparing the service records of the petitioner and respondent No.3, as a whole, it was found that respondent No.3 was more fit and suitable for the aforesaid post. It is required to be noted that even after the appointment of respondent No.3, for a considerable time, the petitioner has not challenged the said action and approached the Court after more than two years, and, in the meanwhile, during the pendency of the petition, the present petitioner himself was promoted to the aforesaid post and which promotion order the petitioner has accepted without making any grievance. Since the present petitioner has already been promoted since long and, in the meanwhile, he has also retired

since 1992, as well as considering the fact that at the time of getting the promotion, the petitioner has never even informed the Department that he accepted the said promotion subject to his rights and contentions which are raised in the petition as well considering the stand of the respondent-State in the reply that after comparing the service record of the petitioner and respondent No.3, respondent No.3 was found more appropriate for the post in question, in my view, the action of the State Government in appointing respondent No.3 at the relevant time cannot be said to be illegal or arbitrary in any manner.

7. The learned Advocate General has argued that even though the word 'promotion' might have been used, as such, he as appointed on the said post and, therefore, simply because the petitioner might be senior, that itself was not relevant, as merit is also required to be considered and the same is not required to be bypassed.

8. Considering the fact that the petitioner himself was thereafter promoted and he accepted the said promotion without protest and even from the promotional post, he has retired since long and considering the fact that the promotion of respondent No.3 was never challenged by the petitioner for more than two years, in my view, this is not a matter, wherein this Court should exercise its extraordinary jurisdiction under Article 226 of the Constitution of India, as there is delay and laches on the part of the petitioner. The contention of Mr.Mehta that the petitioner was making representation to the authority from time to time, cannot be considered for the purpose of entertaining the petition, which is filed after a considerable time from the so-called appointment of respondent No.3.

9. On all the aforesaid grounds, I do not find any substance in the petition. The petition is accordingly dismissed. Rule is discharged with no order as to costs. Interim relief, if any, shall stand vacated.

15th December, 2003 (P.B. Majmudar, J.)

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(apj)